DRAFT

MEMORANDUM FOR: Director of Central Intelligence

THROUGH: Deputy Director of Central Intelligence

FROM: [redacted] STAT
Acting Legislative Counsel

SUBJECT: Civil Service Reform and Whistle-Blowing

1. Action Requested: That you decide whether you will speak as Director of the Intelligence Community or as Director of the Central Intelligence Agency on the issues concerning civil service reform and whistle-blowing.

2. Background:

a. General

The Civil Service Reform Bill, and the so-called "Leahy-Humphrey Legislation" concerning whistle-blowing, present problems for the Agency and the Intelligence Community. The Senate Governmental Affairs Committee is scheduled to begin formal mark-up of the bill this week. The House Post Office and Civil Service Committee has not scheduled any hearings or meetings this week.

b. Civil Service

The Civil Service Reform Bill would effect a comprehensive reorganization of the Federal Government's personnel system. The bill, however, would conflict with your statutory responsibilities and authorities (Tab A). Consequently, the Civil Service Commission submitted amendatory language to the Congress exempting the CIA and other intelligence agencies from the bill. The Senate Governmental Affairs Committee has accepted the amendatory language for Title I, but has not yet worked on Titles IV, V and VI.

c. Whistle-Blowing

To complicate matters, Senators Leahy and Humphrey have introduced legislation related to the Civil Service Reform Bill which would, among other things, extend procedural safeguards to Federal employees, including employees of the Intelligence Community, who blow the whistle on alleged improprieties and wrongdoings. This legislation is unacceptable because it would:

--conflict with your termination authority;

--hamper the Agency in its staffing flexibility and requirements;

--interfere with Agency security and with Agency intelligence functions;

--provide inadequate and insufficient protection for intelligence sources and methods;

--authorize the review of substantive intelligence matters, as well as Agency personnel actions, by entities outside of national security accountability channels, thus widening the access of external entities to intelligence information;

--severely undermine the oversight role of the Intelligence Oversight Board; and

--result in the judicial review of any intelligence information involved in Agency personnel actions.

Civil Service Commission Chairman Campbell, in a letter to Chairman Ribicoff of the Senate Governmental Affairs Committee, expressed the Administration view on whistle-blowing--that is, it should be kept within separate national security channels. (See Tab B for a copy of the letter, and Tab C for a discussion of views on this matter.) According to staff members, there is strong sentiment within the Committee to exclude CIA from the "Leahy-Humphrey Legislation."

d. Community Equities

Defense Department has asked whether you would be willing to send letters to and approach Congressmen on the Communities concern with the Civil Service Reform Bill and with the whistle-blowing legislation.

While it would be appropriate for you to speak for the Community on the issue of whistle-blowing because the problems are similar for all entities of the Community, there are tactical reasons why you might not want to do so for the whole Civil Service Reform Bill. These factors include the following:

(1) If the House and Senate Committees accept the Civil Service Commission's proposed changes, the Agency will be completely exempted from the bill; DIA and NSA, however, will be only partially exempted from the bill. The reason for this disparity is that DIA and NSA are both subject to the Veterans Preference Act, and DIA is subject to the Pay Classification Act. We are exempted from both laws. Many of the provisions of the Civil Service Reform Bill only apply to agencies that are covered by those two laws.

(2) Our fear is that if you go forward as representing the Intelligence Community, this might subject our underlying statutory exemptions and authorities to critical examination. The question might be raised, for example, that since DIA and NSA have been able to operate within the confines of the Pay Classification and Veterans Preference Acts, CIA should also be able to do so. We therefore might lose our proposed exemptions under the Civil Service Reform Bill and invite legislation rescinding other Agency exemptions, such as those from the Pay Classification and Veterans Preference Acts.

3. Staff Position: This paper has been coordinated with OGC, DDA and the Inspector General.

4. Recommendation:

a. That you sign the attached letters to Chairman Nix, of the House Post Office and Civil Service Committee, and Chairman Ribicoff, of the Senate Governmental Affairs Committee, which state the Intelligence Community's concerns generally with the Civil Service Reform Bill and whistle-blowing legislation. This will enable you to fulfill your Community responsibility and at the same time minimize the opportunity for adverse comparisons between the statutory authorities and exemptions of the Agency and other entities of the Intelligence Community, as discussed above. More detailed arguments and positions could be presented, instead, by individual entities; a more detailed letter of the CIA's concerns with the bill would be addressed by Mr. Carlucci as recommended below in 4b.

APPROVED: _____ DISAPPROVED: _____

b. That Mr. Carlucci sign the attached letters to the above Committees stating the CIA's particular concerns with the legislation.

APPROVED: _____ DISAPPROVED: _____

c. If you approve this approach reflected in the letters to Chairmen Ribicoff and Nix, we will then proceed to present to our oversight committees, and to other appropriate members of the committees with jurisdiction over this legislation, our views on this legislation--that is the position of the DCI that intelligence agencies generally should be exempt from the Civil Service reform legislation; that whistle-blowing by intelligence agency employees should be kept within separate, special national security channels; and that the CIA, for unique reasons, must retain its present complete exemption from laws relating to Federal personnel requirements such as the Pay Classification and Veterans Preference Acts. Subsequent to these approaches, which we will coordinate with Defense, it may be appropriate for you and the Deputy Director to personally contact certain Congressmen; we will keep you advised of our progress.

APPROVED: _____ DISAPPROVED: _____

STAT

The Deputy Director
Central Intelligence Agency

Washington, D.C. 20505

Honorable Abraham Ribicoff, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to inform you of the views of the Central Intelligence Agency on S. 2640, the Civil Service Reform Bill. Before the Civil Service Reform bill was submitted to Congress on 3 March 1978, the Civil Service Commission had assured the CIA that the Agency was completely exempted from the provisions of the bill. An exemption is needed to maintain the secrecy and security necessary for the Agency to perform its mission and functions and to preserve the flexibility necessary to manage its unique personnel requirements. On careful reading of the bill as introduced, however, it appeared that the Agency's exemption from the bill was not as comprehensive as necessary or as intended. On 12 May 1978, Chairman Campbell wrote a letter to the Office of Management and Budget in which, among other things, he indicated that the Commission had no objection to and would concur in changes to the bill which reflected the Commission's position that CIA and the other intelligence agencies be exempted from the bill. We are therefore proposing amendatory language which would conform the bill to the Commission's position regarding CIA.

1. Title I. In Title I, the CIA and other intelligence entities are exempt from only proposed section 2301(a) of chapter 23 (which would amend Title 5 United States Code), the Merit System Principles and not from the other two sections (2302 and 2303). However, the provisions of section 2303 would authorize an entity outside the Agency to insure its compliance with certain laws and regulations.

The Civil Service Commission agrees that a complete exemption from all of Title I would exempt the CIA from the external monitoring provisions of Title I, and from the provisions referring to the Special Counsel in Title II (sections 1204 to 1207 amending Title 5 of the United States Code) which authorize the Special Counsel to investigate allegations of prohibited personnel practices described in Title I.

FOIAB5

OGC

Exemption from the authorities of the Special Counsel is particularly important because the Special Counsel would be given extraordinary powers to investigate allegations of reprisals against whistle-blowers.

FOIAB5

OGC

For these reasons, it is proposed that section 2101(a)(2) be amended to read (new language underlined):

"(2) This chapter shall not apply to--"

Section 2101(a)(1) should also be amended to reflect the substitution of the term "chapter" for "section" in 2101(a)(2).

2. Title II. As for Subchapter II in Title II, which involves "Removal or Suspension" for more than 30 days (sections 7511-7514), it should be noted that the Civil Service Commission agrees that the CIA is exempt from such provisions because of the unique nature of its excepted personnel system established under 50 U.S.C. 403(c) and 403j. Though Subchapter II applies to preference eligibles serving in the excepted service generally, the broad scope of the statutory language which governs the CIA's excepted status has been universally interpreted as excepting the Agency from all laws regarding preference eligibles.

Chapter 77, "Appeals," would present no conflict with CIA authorities if the Agency were completely exempted from certain provisions of the bill. Presently, the Agency is exempt from various statutes which give the Civil Service Commission its adjudication and appeals authority and its authority to promulgate rules and regulations. The adjudication and appeals authority of the CSC would be passed, as is, from the CSC to the new Merit Systems Protection Board pursuant to a Presidential reorganization.

The CSC has further acknowledged that the only statutory basis for any new rights of appeal to the Merit Board would be this bill; it is for this reason that CIA seeks, in the other sections of this letter, exemptions from the provisions of the bill which would create new Merit Board rights of appeal.

FOIAB5

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[redacted]

The CSC in its 12 May 1978 letter stated, inter alia, that "...it was the Commission's intention to exclude the CIA from the provisions of the reform bill relating to the Senior Executive Service..." Since it was the CSC's intention to exclude the CIA from the Senior Executive System, the language exempting CIA should be clearly stated. FOIAB5

OGC

We therefore propose that section 3132(a)(2) be amended and redesignated 3132(a)(3). Redesignate all subsequent subsections accordingly and add a new subsection (2) to read as follows:

> "(2) "agency" does not include the Central Intelligence Agency;"

Section 210la should also be amended to reflect the changes made in 3132(a), so as to read (new language underlined):

"The 'Senior Executive Service' consists of positions properly classified above General Schedule 15 and below Executive Level III, or their equivalents, which meet the definition in section 3132(a)(3) of this title, which, except for those in the Foreign Service, are not filled by Presidential appointment requiring Senate confirmation, and which are not excluded as provided for in section 3132(a)(1), (a)(2), and (c) of this title."

4. Title V. Title V concerns the Merit Pay Plan.

[redacted]

Section 5402(a) should be amended to read (new language underlined): FOIAB5

OGC

"(a) In accordance with the purposes set forth in section 5401 of this title, the Office of Personnel Management shall establish a merit pay system which shall cover any employee in a position which regularly requires the exercise of managerial or supervisory responsibilities and which is in GS-13 through GS-15 as established under Chapters 51 and 53 of this title."

5. Title VI. The language which apparently is intended to exempt the CIA from Title VI is not drawn as clearly as necessary. Every effort should be made to provide the clearest possible provisions concerning the scope of this legislation.

Therefore, it is recommended that section 4701(2) should be redesignated 4701(3), that subsequent subsections be redesignated accordingly, and that a new subsection (2) be added as follows:

"(2) "agency" does not include the Central Intelligence Agency;"

As we have stated before, the intent of the Commission was to exclude CIA from the coverage of the bill. There are provisions in the bill which require modification in order to reflect fully this intent. Because this legislation is so complex and comprehensive and because of the statutory conflicts noted above, it is therefore essential that the exemptions covering the CIA be drawn and written as clearly as possible.

Sincerely,

Frank C. Carlucci

The Deputy Director
Central Intelligence Agency

Washington, D.C. 20505

Honorable Robert N. C. Nix, Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The purpose of this letter is to inform you of the views of the Central Intelligence Agency on H.R. 11280, the Civil Service Reform Bill. Before the Civil Service Reform bill was submitted to Congress on 3 March 1978, the Civil Service Commission had assured the CIA that the Agency was completely exempted from the provisions of the bill. An exemption is needed to maintain the secrecy and security necessary for the Agency to perform its mission and functions and to preserve the flexibility necessary to manage its unique personnel requirements. On careful reading of the bill as introduced, however, it appeared that the Agency's exemption from the bill was not as comprehensive as necessary or as intended. On 12 May 1978, Chairman Campbell wrote a letter to the Office of Management and Budget in which, among other things, he indicated that the Commission had no objection to and would concur in changes to the bill which reflected the Commission's position that CIA and the other intelligence agencies be exempted from the bill. We are therefore proposing amendatory language which would conform the bill to the Commission's position regarding CIA.

1. Title I. In Title I, the CIA and other intelligence entities are exempt from only proposed section 2301(a) of chapter 23 (which would amend Title 5 United States Code), the Merit System Principles and not from the other two sections (2302 and 2303). However, the provisions of section 2303 would authorize an entity outside the Agency to insure its compliance with certain laws and regulations.

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Exemption from the authorities of the Special Counsel is particularly important because the Special Counsel would be given extraordinary powers to investigate allegations of reprisals against whistle-blowers.

[redacted]

For these reasons, it is proposed that section 2101(a)(2) be amended to read (new language underlined):

FOIAB5

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Section 2101(a)(1) should also be amended to reflect the substitution of the term "chapter" for "section" in 2101(a)(2).

2. Title II. As for Subchapter II in Title II, which involves "Removal or Suspension" for more than 30 days (sections 7511-7514), it should be noted that the Civil Service Commission agrees that the CIA is exempt from such provisions because of the unique nature of its excepted personnel system established under 50 U.S.C. 403(c) and 403j. Though Subchapter II applies to preference eligibles serving in the excepted service generally, the broad scope of the statutory language which governs the CIA's excepted status has been universally interpreted as excepting the Agency from all laws regarding preference eligibles.

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OGC

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Therefore, it is recommended that section 4701(2) should be redesignated 4701(3), that subsequent subsections be redesignated accordingly, and that a new subsection (2) be added as follows:

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Sincerely,

Frank C. Carlucci

The Director of Central Intelligence

Washington, D.C. 20505

Honorable Abraham Ribicoff, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing to inform you of concerns of the Intelligence Community with S. 2640, the Civil Service Reform Bill, which would effect a sweeping reform of the Civil Service System.

Intelligence agencies have always supported the basic philosophy and principles of the Merit System. However, because of their unique organizational and personnel requirements, they have generally been exempted from many of the statutes governing agencies and departments in the competitive service of the Civil Service System. Reflecting this, the Civil Service Commission, in a 12 May 1978 letter to Office of Management and Budget Director James McIntyre, stated that intelligence agencies should be excluded from coverage of the reform legislation on "the basis of security reasons." Civil Service Commission Chairman Campbell reiterated this view in his 17 May 1978 letter to you, in which he also submitted amendatory language exempting intelligence agencies from the bill.

It is my understanding that Senator Humphrey is introducing legislation which would, among other things, extend procedural safeguards to all Federal employees who blow the whistle on alleged improprieties and wrongdoings. I believe, however, that the Intelligence Community must have its own accountability system, as reflected currently, for example, in the standing intelligence committees of Congress, the establishment of Inspectors General within the Central Intelligence Agency and other agencies, and the Intelligence Oversight Board in the Executive Office of the President. These views and recommendations are reflected in the 22 May 1978 letter from Chairman Campbell to you; that letter reflects the views of the Administration.

I strongly endorse these views and recommendations and urge their adoption by your Committee. More detailed supportive information may be provided by individual intelligence agencies.

Yours sincerely,

STANSFIELD TURNER

The Director of Central Intelligence

Washington, D.C. 20505

Honorable Robert N. C. Nix, Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to inform you of concerns of the Intelligence Community with H.R. 11280, the Civil Service Reform Bill, which would effect a sweeping reform of the Civil Service System.

Intelligence agencies have always supported the basic philosophy and principles of the Merit System. However, because of their unique organizational and personnel requirements, they have generally been exempted from many of the statutes governing agencies and departments in the competitive service of the Civil Service System. Reflecting this, the Civil Service Commission, in a 12 May 1978 letter to Office of Management and Budget Director James McIntyre, stated that intelligence agencies should be excluded from coverage of the reform legislation on "the basis of security reasons." Civil Service Commission Chairman Campbell reiterated this view in his 17 May 1978 letter to you, in which he also submitted amendatory language exempting intelligence agencies from the bill.

I strongly endorse these views and recommendations and urge their adoption by your Committee. More detailed supportive information may be provided by individual intelligence agencies.

Yours sincerely,

STANSFIELD TURNER

CIVIL SERVICE REFORM BILL AND THE NEED FOR CIA EXEMPTION

1. The unique mission and functions of the CIA are reflected in special organizational and personnel requirements. In recognition of this, the Agency has been exempted from many provisions of law regarding appointments, promotions, and separation from service. These exemptions are firmly based on the following factors:

--the need for CIA to protect the confidentiality of intelligence sources and methods;

--the need for flexibility in melding personnel resources to rapidly shifting requirements of foreign relations;

--the special hazards to which intelligence officers are subject in fulfilling their duties; and

--the unique pressures, such as susceptability to "targeting" by foreign intelligence services, to which intelligence agencies and employees are subject.

2. The provisions of the Civil Service Reform legislation (H.R. 11280/S. 2640) would:

--conflict with the statutory responsibility of the Director of Central Intelligence to protect sources and methods from unauthorized disclosures (50 U.S.C. 403(d)(3) and 403g);

--conflict with the discretionary authority of the Director of Central Intelligence to remove employees of CIA in order to protect and further the nation's foreign intelligence efforts (50 U.S.C. 403(c)); and

--hamper CIA in its staffing flexibility and requirements and would conflict with its exempted status under 50 U.S.C. 403j.

3. The Central Intelligence Agency, therefore, in conformity with existing statutory exemptions and authorities should be exempt from the provisions of this bill.

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

CHAIRMAN

May 22, 1978

Honorable Abraham Ribicoff
Chairman, Committee on
Governmental Affairs
3308 Dirksen Senate Office Building
Washington, D.C. 20510

STAT

Dear Chairman Ribicoff:

On behalf of the President, I wish to express our appreciation to the Governmental Affairs Committee for moving responsibly and expeditiously to consider the administration's civil service reform proposals. At the initial mark-up session scheduled for this morning, my understanding is that the Committee will generally review the legislation, and then focus more specifically on Titles I and II of the bill. To aid the members, I thought it would be useful to summarize concisely some of the major issues which are likely to arise, and to explain the administration's approach to resolving them.

As you know, this is the first comprehensive reexamination of the Federal civil service system since it was created nearly a century ago. Necessarily, the proposals are complex. However, virtually all features of the program can be related to two sets of guiding objectives:

1. To increase individual performance incentives, broaden management flexibility, and cut red tape.

   -- Single-mission, single-headed Executive Branch Office of Personnel Management (OPM);

   -- Senior Executive Service and phased-in Merit Pay for managers GS-13-15;

   -- Streamlined disciplinary procedures to make inadequate performance a practical basis for demotion or dismissal;

-- Modifications in Veterans' Preference;

-- Delegation of personnel decision making authority to agencies under OPM guidance.

2. To strengthen protection of employee rights and prevent political abuse of merit principles.

-- Independent, single-mission, bipartisan Merit Systems Protection Board (MSPB);

-- Special Counsel within MSPB, with fixed term of office, to investigate and remedy political and other forms of abuse;

-- Enumeration of specific categories of merit principles and prohibited personnel practices;

-- Strict penalties for individual violators of prohibited practices;

-- Codification in law of Executive Order 11491 which now governs Federal sector labor-management relations.

As is apparent from the above st[illegible] the proposal will be significantly enhanced by the Reorganization Plan announced by the President on March 2, which he will submit later this week. Under that Plan, the employee rights protection functions, including inquiry and adjudicatory powers, will be transferred from the existing Civil Service Commission to the MSPB; the MSPB will become an independent agency, beyond the control of the President, and will be headed by a three-member bipartisan board, in keeping with its quasi-judicial character, with overlapping terms and ineligibility for reappointment. The executive function of managing Federal personnel policy, which the CSC now discharges along with its adjudicatory duties, will be inherited by the OPM. Accordingly, it will be an Executive branch agency with a single chief.

Since I understand that today's discussion will concentrate on Titles I and II of the bill, I would like to address some of the major issues likely to arise regarding those provisions.

TITLE I--MERIT SYSTEM PRINCIPLES

One of the fundamental sources of confusion within the existing civil service system is the absence of any definitive statement of its constitutive principles and prohibited practices. Title I fills this need. It creates a new Section 2301 in Title 5 of the Code wherein eight merit system principles are prescribed--e.g., recruitment of the most qualified candidates to serve the accepted aims of Federal employment; assurance of nondiscrimination, provision of equal pay for work of equal value, protection of employees against arbitrary action, etc. The Title also specifies, in a new Section 2302 of Title 5, nine prohibited personnel practices. These prohibitions, including unlawful discrimination, political coercion, granting illegal preferences, and reprisal against "whistle-blowers," are made enforceable through the Merit Systems Protection Board and the Special Counsel under Title II.

The Administration intends that the merit principles and prohibited personnel practices, together with the enforcement apparatus prescribed by Title II, will cover virtually all entities within the Executive establishment, except for government corporations, the intelligence community, the General Accounting Office, and any other agency, unit, or position exempted by action of the President. The Administration believes that the intelligence community must have its own accountability system. Such a system has been developed over the past two years, embracing the standing intelligence committees of the Congress, the establishment of inspectors general within the Central Intelligence Agency and other agencies, and the reinforcement of the Intelligence Oversight Board in the Executive Office of the President.

(3)

TITLE II--CIVIL SERVICE FUNCTIONS: PERFORMANCE APPRAISAL; ADVERSE ACTIONS

Title II supplements the civil service Reorganization Plan by spelling out certain new functions and changes in existing functions to be discharged by OPM, MSPB, and the Special Counsel. On the basis of our discussions with Committee members and staff, and our review of the hearing record, we think it would be useful here to single out two major issues--MSPB hearing procedures following dismissal or demotion of an employee, and whistleblower protection.

A. MSPB hearing procedures: The need to make job performance a practical basis for demotion or dismissal.

The provisions in Title II proposing reforms of employee disciplinary procedures (Section 202, 203, and 204) go to the heart of the President's design for overhauling the civil service system. These new procedures have one overriding objective--to make inadequate job performance a practical basis for demotion or dismissal. Under the procedures which now exist, that simple goal has not been achieved.

To attain this goal, essential to a work environment in which productivity is conscientiously and consistently pursued, we have tried to restructure existing procedures to promote a single underlying purpose: the language of the bill should send to the MSPB and its hearing officers the strongest possible signal to uphold an agency's considered judgment that an employee's job performance has been unacceptable -- as long as that judgment is reasonable and not arbitrary; if on the same facts a reasonable person could have reached the same conclusion the agency did -- even if other reasonable persons could have reached alternative or opposite conclusions -- then the agency's action should stand. Federal managers given tremendous responsibilities by modern statutes cannot be held accountable for their performance, if they cannot hold their subordinates similarly accountable. If the language of the bill which ultimately passes the Congress does not achieve this simple aim, then a major element of reform will be lost.

The administration bill provides that an employee may not be demoted or dismissed by the agency until after he has received notice of the charges against him, an opportunity to respond orally and in writing, and a period in which to improve his performance. After the adverse action has been taken by the agency, he may appeal to the MSPB.

At the MSPB, the Board or an assigned appeals officer or Administrative Law Judge must decide the appeal on the record after a full evidentiary hearing, unless there are no material facts in dispute. Tracking the summary judgment procedure used in the Federal courts, if disputed material facts are absent from the record, the case may be decided without a full hearing. An employee dissatisfied with the decision of the appeals officer or the Administrative Law Judge may petition the Board for a review of the decision.

Criticisms of the MSPB procedures have focused upon an alleged shifting of the burden of proof to the employee and establishing a dual system for adjudicating employee discrimination complaints. With regard to the first criticism, we have recently specified that the agency carry the initial burden of making a prima facie demonstration of its case. Thereafter the employee may rebut. The appeals officer must set aside the agency action if he finds that the employee was a victim of discrimination, that the agency action, though regular on its face, was arbitrary and capricious, or that the agency committed procedural errors which substantially impaired the employee's defense.

In order to avoid any confusion regarding the discrimination question, the bill provides that the definition and review standards are identical to those found in Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act and the Rehabilitation Act. Finally, all MSPB adjudications involving discrimination matters may be reviewed by the Equal Employment Opportunity Commission consistent with Reorganization Plan No. 1 of 1978.

B. Whistle-blower protection: The need for strong -- but carefully defined -- safeguards.

The President's bill creates an entirely new right for Federal employees--the right to "blow the whistle" on wrongdoing by their colleagues and superiors without fear of official reprisal. This right is created in Title I, which specifies among the eight categories of prohibited personnel practices:

> "reprisal. . . for the [lawful] disclosure . . . of information concerning violations of law, rules, or regulations."

In other words, the bill makes it illegal to use any personnel action, such as a downgrading or unfavorable performance evaluation, to harm an employee for blowing the whistle on violations of laws, rules, or regulations within the bureaucracy.

This new right is backed up by potent sanctions, provided by Title II. If an agency retaliates against a whistle-blower by using a personnel action other than one which may be appealed to the MSPB, the Special Counsel may unilaterally stay that personnel action. If the agency attempts to demote or dismiss the whistle-blower, the MSPB is empowered to reverse the agency action. In addition, the Special Counsel may prosecute

individual offenders before the MSPB and seek imposition of penalties ranging from civil penalties up to $1,000, removal and debarment from Federal employment for up to five years; these potent sanctions will deter cynical officials from harassing whistle-blowers. Finally, the Special Counsel may recommend general remedial action to the agency head in question.

A number of criticisms have been leveled at the President's whistle-blower protection provisions, and alternative bills have been introduced. All of these criticisms come down, we believe, to one point: a failure in the Administration's bill to provide for revelations of bureaucratic wrongdoing which does not amount to illegality--i.e., activities which are "improper," "wasteful," or "inefficient," but not violations of laws, rules, or regulations.

In discussions with the Committee staff and some members, we have acknowledged this point, and discussed the outlines of a concept to resolve it, which we will describe below. However, we remain strongly opposed to alternative bills which have been introduced. Though well-intentioned, these proposals would severely compromise the design of the President's civil service reform program to make the bureaucracy more manageable and effective. In particular:

-- Some whistle-blower protection proposals would put the MSPB in the business of substantive oversight of agency policy and implementation--as distinguished from the mission of protecting employee rights. These measures would give the MSPB and Special Counsel broad powers to investigate and impose sanctions for correcting the alleged improper or illegal activities which a particular whistle-blower has revealed. We believe this is a job which surely should be done--but not by institutions designed to enforce rights created by the personnel system. Employee rights protection is itself a challenging mission; these new entities created by the civil service reform package should not be distracted by a very different and even more complex responsibility--substantive agency oversight. We strongly oppose turning the MSPB and its Special Counsel into a "little GAO." (1)

-- Overbroad whistle-blower protection provisions will encourage employees who anticipate demotion, dismissal or other personnel actions to stage a "leak," in order to claim the special protections afforded whistle-blowers. This prospect is a very serious concern, and the sham whistle-blower tactic has already been used in at least one major instance. The alternative bills would give poor performers tremendous new leverage to block legitimate personnel actions, simply by threatening a manager with disruption of his or her program by public attacks on it, and by forcing the manager into tedious MSPB or court litigation over the whistle-blower charges. These bills will spawn a new form of personnel litigation, which will likely prove a more insurmountable obstacle to effective managerial leadership than is the current disciplinary apparatus, which the President's bill seeks to reform.

-- Overbroad whistle-blower protection measures enhance existing incentives to use "leaks" as a bureaucratic political weapon against policies or practices with which an employee simply disagrees. Most of the alternative bills prohibit the imposition of any type of discipline when employees publicly disclose internal activities which they "reasonably believe" to be "improper." Under such formulations, essentially no internal communication to any agency official, or even the President, would be confidential, whether made in a meeting or a written memorandum. Employees could be encouraged to campaign publicly against policy decisions of which they disapprove. Even now, the practical fact is that wide latitude exists to use this avenue to frustrate the implementation of legitimate policies, especially innovations potentially threatening to major interest groups or other powerful opponents.

The Administration believes that the gap in its original whistle-blower protection proposal can be filled, without exacerbating the problems sketched above. Our proposal is to assure that employees be guaranteed the right to safely and confidentially report wasteful, inefficient, or improper activities to an entity which has the independence and the capability to investigate, apply remedies, and report to Congress and the public. The best vehicle for accomplishing this purpose is the Inspector General concept developed by the Governmental Affairs Committee. (2) Two major departments--HEW and DOE--have inspectors general; a number of others would receive them under the pending bill recently passed by the House and now pending before the Committee. We believe that the Inspector General concept is well suited to providing an effective check on wasteful and improper activities within agencies, and a channel for communicating such wrong-doing to Congress.

We would support amendments to the Inspector General legislation, if necessary, and to the civil service reform legislation to assure that communications by employees with the Inspector General are securely protected against reprisal.

In conclusion, we wish once again to thank you and the other members of the Committee for your consideration of the major public issues addressed by the President's civil service reform proposals. We are eager to provide the Committee and its staff with more detailed information regarding the two crucial questions discussed in this letter, as well as on other issues raised by Titles I and II, and the remainder of the package.

I would appreciate it if you could share this letter with your colleagues on the Committee.

Sincerely,

Alan K. Campbell

Alan K. Campbell
Chairman

TAB

WHISTLE-BLOWING LEGISLATION AND THE NEED FOR
SPECIAL CHANNELS FOR INTELLIGENCE AGENCIES

A. Objections to the Federal Employee Protection Act of 1978 (S. 3108), and Recommendations

A particularly objectionable situation could result from the factors outlined in "B" below since the Director of Central Intelligence could be forced to retain an employee on a particularly sensitive national security project, thereby endangering the success of the mission itself, merely because, in the eyes of the proposed Special Counsel, the employee on his own raised a colorably legitimate complaint that the project was improper, illegal or merely "wasteful."

National security and intelligence matters generally, and possible intelligence agency improprieties in particular, are sufficiently different from other Government matters to warrant special treatment. This situation is reflected, for example, in S. Res. 400 and H. Res. 658, establishing, respectively, the Senate and House oversight committees. Legislation in this area should reflect that whistle-blowing procedures applicable to intelligence agencies and employees should be kept in separate channels, not merely that there be special procedures for handling the information while applying the same whistle-blowing procedures as for all other Government employees (the Humphrey-Leahy legislation does this). A 22 May 1978 letter from Civil Service Chairman Campbell to Chairman Ribicoff reflects the view that the Administration supports keeping intelligence employee whistle-blowing in separate channels (see Tab B; particularly page 3 thereof).

Although we support the position outlined in the preceding paragraph, we believe that the Agency should not, at this time, propose specific alternative whistle-blowing procedures for intelligence employees. This matter is an issue in the intelligence charter legislation (S. 2525/ H.R. 11245); as yet, there is no consensus as to its resolution (e.g., whether the IOB mechanism should be codified in statute or left to Executive Order procedures). The charter legislation process, addressing as it will the wide variety of intelligence authorities, requirements and procedures, is the proper place to determine what whistle-blowing procedures should apply to intelligence employees. It is premature to discuss specific resolution of this matter in a vacuum at this time.

B. Provisions of the Federal Employee Protection Act of 1978 (S. 3108)

1. Merit System Protection Board (Merit Board)

--Five members appointed by the President, with advice of the Senate. Three may be members of the same political party; none may hold another office or position in the U.S. Government. Must have security clearances. Can only serve for one five-year term.

--Members and their designees have subpoena powers.

--Must submit annual report to the Congress of its activities, including a list of names of employees on whom penalties under this act have been imposed.

2. Special Counsel

--Must be an attorney; must have security clearances; appointed by the President, with advice and consent of the Senate. Serves for only one five-year term.

--Has all powers to carry out the provisions of the Act.

3. Disciplinary action may not be taken against an employee who discloses classified information concerning activities which the employee believes are illegal, provided he reveals such information to the Congress, the proposed Merit Board, the proposed office of Special Counsel, the U.S. Courts, any agency or any other employees. Only if the employee discloses classified information to "the public" could adverse action be taken.

--Upon receipt of the allegation, the Special Counsel must conduct an investigation within 15 days. If he decides not to proceed, this decision may be appealed to the Merit Board. The Special Counsel may also freeze any adverse personnel action taken against a complaining employee. Allegations which appear to have merit are referred to the appropriate agency head who must complete his investigation within 30 days; he does have a 15-day grace period. A representative of the Special Counsel will monitor the investigation and the Special Counsel is empowered to institute his own which would determine, apparently, whether the information on which the "whistle was blown" in fact concerned an illegal or improper activity.

--Only portions of hearings or proceedings involving classified information will be closed to the public. All transcripts will be protected and available to the public.

--Persons involved with the hearings who do not have security clearances, nonetheless, will have access to all information under the supervision and direction of the Special Counsel. They will be allowed to attend all the hearings and proceedings and take part in the investigation.

--The Special Counsel may appoint any person to look at classified information and attend all hearings, proceedings, or investigations.

--The Special Counsel has power to order corrective personnel actions, including reinstatement, removal, payments or damages.

--The Special Counsel may institute disciplinary proceedings against an employee who has taken, or attempted to take, an adverse personnel action against a complaining employee or who has engaged in, or attempted to engage in, an illegal or improper activity.

4. Appeals

--Any aggrieved employee or agency may appeal Special Counsel decisions to the Merit System Protection Board and then to the Courts.

5. Miscellaneous

--The Court will award attorney's fees and costs.

--The Court will also furnish employees with representation regardless of cost.

--U.S. Government may recover from any employee who committed a willful and knowing violation under this bill damages, fees and costs.

C. For comparison, the following are the salient provisions concerning whistle-blowing in the Civil Service Bill itself:

--Grants subpoena power to Special Counsel, proposed Merit Board and other designated personnel.

--The Special Counsel can freeze any personnel action having substantial economic impact on complaining employee until the investigation is over.

--The Special Counsel can require an agency head to take corrective action.

--If no corrective action is taken, the Special Counsel could institute disciplinary proceedings against an employee who failed to implement corrective action.

--The Special Counsel will maintain a public list of violations of law or regulation referred to an agency head, along with a certification of actions taken thereon.